

No. PD-0174-17

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/14/2017
DEANA WILLIAMSON, CLERK

RICARDO ZUNIGA,
Appellant/Respondent

vs.

THE STATE OF TEXAS,
Appellee/Petitioner

**APPELLANT/RESPONDENT'S REPLY BRIEF TO STATE'S BRIEF
ON PETITION FOR DISCRETIONARY REVIEW**

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-14-00153-CR**

Ruben P. Morales
Attorney for Defendant
State Bar No. 14419100
718 Myrtle Avenue
El Paso, Texas 79901
(915) 542-0388
(915) 225-5132 fax
EMAIL: rbnpmrls@gmail.com

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SUMMARY OF THE ARGUMENT

REPLY TO GROUND FOR REVIEW ONE:

The Eighth Court did not require the State to prove motive for the killings. It did require the State's proof to establish more than just the simple fact that Zuniga was a Barrio Azteca and that he and other Barrio Aztecas along with other people whose gang membership was unknown, committed a murder. As per the engaging statute, a person engages in organized criminal activity if, with the intent to establish, maintain, or participate as a member of a criminal street gang, the person commits or conspires to commit one or more of the listed offenses, including capital murder. Tex. Pen. Code Ann. § 71.02 (West 2015). See also *Hart v. State*, 89 S.W. 3d 61, 63 (Tex. Crim. App. 2002). Since the State failed to prove an intent to establish, maintain, or participate as a member of a criminal street gang, the evidence was insufficient.

Zuniga v. State, No. 08-14-00153-CR, 2016 WL 5121992, at *12 (Tex. App. Sept. 21, 2016), petition for discretionary review refused (June 7, 2017), petition for discretionary review granted (June 7, 2017)

ARGUMENT – REPLY TO GROUND FOR REVIEW ONE

REPLY: The Eighth Court correctly held that in order to prove engaging in organized criminal activity as a member of a criminal street gang, the State is required to prove not only that the defendant is a member of a criminal street gang and committed one of the enumerated offenses, but also that in committing the enumerated offense, the defendant intended to establish, maintain, or participate in committing the offense as a member of a criminal street gang. Otherwise, the statute's express requisite intent becomes meaningless.

- I. The evidence at trial demonstrates that Zuniga was a Barrio Azteca and that the evidence was sufficient to find him guilty of the underlying offenses either as a primary actor or as a party.**

The Eighth Court correctly held the evidence legally insufficient to allow a rational juror to conclude that Zuniga murdered the Vargas brothers with the intent to establish, maintain, or participate as a member of the Barrio Aztecas. The State repeatedly argues that the Eighth Court's holding requires the State to provide a motive for the killings. This assertion is incorrect and misleading. The Eighth Court's holding simply gives constitutional legitimacy to the engaging statute by not allowing a conviction for an elevated offense to be based solely on a person's status as a gang member. *See Robinson v. California*, 370 U.S. 660 (1962).

The State also attempts to equate participation as a party to participation as a member of a street gang. The two are not the same. Clearly, one can be a party to the underlying offense without any consideration as to whether the person is part of a gang. *Otto v. State*, 95 S.W.3d 282, 284 (Tex. Crim. App. 2003). As such, party

liability is not synonymous with participation as a member of a gang.

The State loosely sets out the elements for holding Zuniga responsible for the underlying offense as a party but not the elements necessary to find that Zuniga is guilty of engaging in organized criminal activity. Again, the State attempts to blur the lines between two very distinct statutes and confuses the Court's interpretation of the law. It interprets the Eighth Court's holding as requiring the State to prove the gang's motive for committing the crime; however, the Eighth Court does no such thing. Rather, the Eighth Court correctly explains that, in the present case, the State must prove beyond a reasonable doubt that the killing was in some way related to Zuniga's involvement in gang activity.¹ *Zuniga* at *13. Since the State failed to prove that the fight was in any way related to gang membership, it failed to prove a key element of engaging in organized criminal activity. The fact that Barrio Aztecas may commit crimes in furtherance of Barrio Azteca gang activities does not mean that every time a Barrio Azteca commits one of these crimes, it is related to the gang's activities. The mere fact that a gang member commits a crime cannot be used as a basis to find every gang member guilty of engaging in organized criminal

¹ The State asserts that it proved that the murders were committed as part of an organized criminal street gang but it fails to point to evidence that supports this assertion. It makes conclusory statements without providing a basis for these conclusions. The simple fact that some of the people involved in the murders were gang members does not provide the requisite intent for an engaging conviction. *See Hart*, 89 S.W.3d at 63.

activity regardless of whether the State can prove the statutorily and constitutionally required intent.

II. The Eighth Court's holding did not require the State to prove a motive for the killing.

A. Section 71.02 of the Penal Code and *Hart v. State*

Relying on this Court's holding in *Hart v. State*, the Eighth Court writes:

Engaging in organized criminal activity contains two mental state requirements. *Hart v. State*, 89 S.W.3d 61, 63 (Tex. Crim. App. 2002). One of the mental state requirements is included in the commission of one of the enumerated offenses. § 71.02(a). For example, if the enumerated offense is capital murder, the State must prove that the appellant murdered more than one person during the same criminal transaction as part of proving the underlying enumerated offense. § 71.03(7)(A). The other mental state requirement in section 71.02(a) is that the appellant intend to establish, maintain, or participate [as a member of a criminal street gang]. *Hart*, 89 S.W.3d at 63. This second requirement necessarily requires more than the intent to commit the enumerated offense because otherwise the statutory element would be superfluous. *Id.* The State must prove not only that the defendant is a member of a criminal street gang and committed one of the enumerated offenses; the evidence must support a finding that the defendant intended to establish, maintain, or participate [as a member of a criminal street gang]. *Id.* Otherwise, the statute's express requisite intent is meaningless. *Id.* at 64.

Zuniga v. State, No. 08-14-00153-CR, 2016 WL 5121992, at *12 (Tex. App. Sept. 21, 2016), petition for discretionary review refused (June 7, 2017), petition for discretionary review granted (June 7, 2017).

B. The Eighth Court’s holding is both technically and grammatically correct based on *Hart*.

While *Hart* involved a combination and this case involves a criminal street gang, the distinctions between the two are of no import in resolving the issues in this case. Combination means “three or more persons who collaborate in carrying on criminal activities.” Tex. Penal Code § 71.01(a). “Criminal street gang means three or more persons ... who continuously or regularly associate in the commission of criminal activities.” Tex. Penal Code § 71.01(d). The State’s argument that it is not technically or grammatically correct to apply *Hart* to the “criminal street gang” form of engaging is without merit. *See Licerio v. State*, No. 12-11-00326-CR, 2013 WL 414239, at *4 (Tex. App. – Tyler 2013, pet. ref’d). A combination and a criminal street gang are simply two different forms of three or more persons associating in the commission of criminal activities. Unless the State is arguing that this Court’s interpretation of the engaging statute in *Hart* is incorrect, (which it is not), the State has failed to provide any cogent, logical reason why sufficiency requirements for a combination would be different than the sufficiency requirements for a criminal street gang.

C. The Eighth Court did not require proof of the gang’s motive but simply proof that the offenses were related to gang activity.

The State’s assertion that the Eighth Court required it to prove a motive for

the underlying offense is erroneous. In fact, the Eighth Court in its opinion illustrates the kind of evidence that may suffice for an engaging offense by citing to several cases where the State presented evidence of gang related activity at or near the time of the underlying offense, sufficient to support an engaging conviction. In *Gomez v. State*, there was evidence that a Barrio Azteca member told Gomez, also a Barrio Azteca member, that those guys owed him money. Gomez himself, also admitted that he had gone to the A&M Bar and asked the victims for a fee, (consistent with the drug tax or “cuota” collected by Barrio Aztecas) and then Gomez ended up stabbing one of the victims. *Gomez v. State*, No. 08-12-00001-CR, 2014 WL 3408382 (Tex. App. –El Paso, July 11, 2014, no pet.)(not designated for publication).

In *Romero v. State*, it was alleged that the crime was committed with intent to participate as a member of the Crips. No. 08-10-00074-CR, 2012 WL 3834917, at *5 (Tex. App. – El Paso, Sept. 5, 2012, pet. ref’d)(not designated for publication). A witness testified that Romero approached two other Crips members and said they needed to “violate” someone who did not have Crip knowledge. The witness was then excluded from the rest of the conversation because he was not a Crip. Subsequently, Appellant and the two other Crips members became involved in a fight with the decedent. *See also Jaramillo v. State*, No. 08-00-00489-CR, 2002

WL 1301566, at *6 (Tex. App. -- El Paso June 13, 2002, pet. ref'd)(not designated for publication)(Evidence that rival gangs were throwing gang signs at each other, gang members were spraying graffiti at the party before being asked to leave the party and Appellant admitted that he was in a rival gang's territory sufficient to show participation as a member of a criminal street gang.)

While the evidence of gang activity may provide a motive for the underlying offense, it is not required to do so. For example, flashing gang signs does not necessarily provide a motive for an offense but it can show a person is acting in his capacity as a gang member. Likewise, discussing the need to assault a non-gang member and then following through with an assault on a non-gang member may also show an intent to participate in gang related activity.

The State's own example in footnote 6 of its opening brief illustrates the need for more than mere membership in a gang to prove engaging. In the State's road rage example, if two confirmed members of the driver's criminal street gang were also passengers in the vehicle, and they encouraged the driver's road rage, it still does not make any of the three gang members guilty of engaging in organized criminal activity absent some proof that the matter was related to establishing, maintaining or participating in the underlying offense as a member of a criminal street gang. Much like this case, the simple fact that other gang members may have

participated in the commission of the crime does not make it an engaging offense. Now, if the driver or passengers began flashing gang signs prior to running the victim off the road or claimed the victim had invaded gang turf or somehow disrespected the gang, then there could be proof of an engaging offense.

In this case, the Eighth Court was correct to hold that absent evidence of gang activity, the evidence was insufficient to support convictions for engaging. The State spends considerable time in its brief referencing evidence that was excluded by the trial court. State's Brief 7-8, fn 7 and fn 8. Much like the prosecutors at trial, the State sets out to improperly influence the decision-making process by making repeated references to matters that were held inadmissible by the trial court and cannot be considered in making a sufficiency determination. *Zuniga* at *4-5. The State's reliance on the expert's testimony is misplaced as he simply stated the obvious, that gangs commit murders. While Zuniga was a Barrio Azteca and some others involved in the fight were also Barrio Aztecas, there was no legally relevant, admissible evidence that the offense was gang related. The Eighth Court ruled correctly and this Court should affirm its decision.

PRAYER

Appellant prays that this Court deny the State's requested relief and affirm the Eighth Court's reversal and acquittal on the two engaging counts.

Respectfully submitted,

/s/ Ruben P. Morales
RUBEN P. MORALES
ATTORNEY FOR APPELLANT
State Bar No. 14419100
718 Myrtle Avenue
El Paso, Texas 79901
(915) 542-0388
(915) 225-5132 fax
rbnpmrls@gmail.com

CERTIFICATE OF SERVICE

I certify that on September 12, 2017, a copy of Appellant/Respondent's Reply Brief was sent by email, through an electronic-filing-service provider, to petitioner's attorney: Raquel Lopez, raqlopez@epcounty.com.

I further certify that on September 12, 2017, a copy of Appellant/Respondent's Reply Brief was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ruben P. Morales
Ruben P. Morales

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,865 words, as indicated by the word-count function of the computer program used to prepare it, and complies with the applicable Texas Rules of Appellate Procedure.

/s/ Ruben P. Morales
Ruben P. Morales